



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Universal Parking Corporation

File: B-236986

Date: October 20, 1989

DIGEST

1. An amendment which incorporates into an invitation for bids for lease of a parking lot an additional requirement of minimum operating hours is material since it imposes a legal obligation on the contractor that was not contained in the original solicitation and therefore changes the legal relationship between the parties.
2. A bidder's failure to acknowledge with its bid a material amendment to an invitation for bids renders the bid nonresponsive.
3. A bidder's intention and commitment to perform in accordance with the terms of a material amendment is determined from the acknowledgment of such amendment or constructively from the bid itself, not from the bidder's past performance under a prior contract. Where a bid does not include an essential requirement which appears only in the amendment, there is no constructive acknowledgment of the amendment.

DECISION

Universal Parking Corporation protests the rejection of its bid and the subsequent award of a contract to The Q Companies, under invitation for bids (IFB) No. MDA946-89-L-0047, issued by the Department of Defense, Washington Headquarters Services (WHS), for the lease of parking space in the Pentagon north parking area. Universal's bid was rejected as nonresponsive because it failed to acknowledge an amendment to the IFB. Universal contends its failure to acknowledge the amendment should be waived as a minor informality.

We deny the protest.

WHS issued the IFB on August 1, 1989, with bid opening scheduled for August 31. Prior to bid opening, WHS issued

amendment No. 1, the only amendment to the solicitation, which incorporated into the IFB the minimum hours for operating the parking lot. Universal, the incumbent contractor and high bidder, failed to acknowledge the amendment. As a result, the contracting officer found Universal's bid nonresponsive.

Universal challenges the contracting officer's determination that its bid was nonresponsive, maintaining that the amendment was a clarification of a preexisting obligation under the solicitation. WHS disagrees, arguing that the amendment is not a clarification as Universal's argument suggests, but instead a material amendment which created a new legal obligation. We agree.

A bid that does not include an acknowledgment of a material amendment must be rejected because, absent such an acknowledgment, the bidder is not obligated to comply with the terms of the amendment, and thus its bid is nonresponsive. Woodington Corp., B-235957, Oct. 11, 1989, 89-2 CPD ¶ _____. Even where an amendment may not have a clear effect on price, quantity, or quality, it nonetheless is considered material where it changes the legal relationship between the parties, as, for example, if the amendment increases or changes the contractor's obligation or responsibilities. Mak's Cuisine, B-227017, June 11, 1987, 87-1 CPD ¶ 586. The materiality of an amendment which imposes new legal obligations on the contractor is not diminished by the fact that the amendment may have little or no effect on the bid price or the work to be performed. Adcon, Inc., B-224209, Dec. 10, 1986, 86-2 CPD ¶ 666.

Here, the original IFB provided the following "special lease requirements":

- "a. The Lessee will charge a daily maximum amount of \$2.25 per motor vehicle. This daily maximum amount of \$2.25 per motor vehicle will be in effect for the entire term of the lease.
- "b. Patrons who have paid the maximum daily parking fee (\$2.25) will be allowed to leave and reenter the parking lot without repaying the daily parking fee.
- "c. The parking of motor vehicles will be limited to the paved marked spaces. There will be no motor vehicles double parked.

"d. No keys will be left in the motor vehicles and no keys will be left with the parking attendants."

Amendment No. 1 added the following requirement: "The minimum hours of operation will be 6 a.m. thru 1 p.m., Monday thru Friday except for Legal Holidays."

Under the IFB as originally issued the contractor was free to open and close the parking lot on its own initiative since the solicitation was silent concerning any hours of operation. Similarly, Universal's prior contract did not specify minimum operating hours. However, as a result of the amendment to the current solicitation, the contractor no longer may elect when and how long to operate the parking lot but, instead, is required to operate the parking lot at least during the hours 6 a.m. thru 1 p.m., in accordance with the agency's minimum needs. Since the amendment imposes a new obligation on the contractor which did not exist in the original solicitation and thus changes the legal relationship between the parties, the amendment incorporating it into the IFB clearly was material. Lake City Management, B-233986, Mar. 9, 1989, 89-1 CPD ¶ 259; Mak's Cuisine, B-227017, supra.

Universal argues that the amendment does not change the legal relationship between it and WHS and therefore does not create any additional obligation on Universal's part because, as the incumbent contractor, it chose to maintain hours of operation (5 a.m. thru 6 p.m.) that far exceeded the minimum hours required by the amendment to the current solicitation. In this regard, Universal states that since its prior hours of operation were registered with the Pentagon police, Universal was already bound to keep the parking lot open for a greater length of time than was specified in the amendment.

To the extent that Universal argues that its past performance under the prior contract evidences its intent to adhere to the current solicitation's amendment and, therefore, should be imputed to its current bid, Universal's past practice is not controlling. Rather, a bidder's intention and commitment must be determined from the bid as submitted. Mckenzie Road Serv., Inc., B-192327, Oct. 31, 1978, 78-2 CPD ¶ 310. Here, Universal's bid did not indicate any hours of operation. Further, Universal does not explain why its registration of operating hours with the Pentagon police in connection with its prior contract in any way obligated it to maintain those hours. Thus, given the absence of any reference in the bid to operating hours, Universal would not be bound to any particular operating

schedule under a contract awarded pursuant to the current IFB, regardless of its past practice.

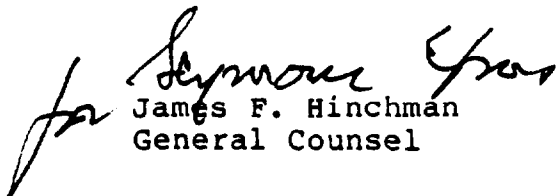
Universal also contends that the amendment was not material because it merely clarified an implicit requirement in the IFB to operate the parking lot during reasonable hours in order to meet the needs of the parking lot patrons. We find this argument unpersuasive since there is no reason to assume that the parties to the contract would share the same interpretation of reasonable operating hours, and the requirement for particular operating hours clearly imposed a specific obligation on the contractor which was not present in the original IFB.

Universal also argues that it implicitly accepted the amendment to the IFB when it submitted its bid after the amendment was issued. In this regard, Universal claims that its bid price reflected its intention to operate the parking lot for 13 hours daily.

We have consistently held that an amendment may be constructively acknowledged if the bid itself includes an essential requirement that appears only in the amendment. C Constr. Co., Inc., 67 Comp. Gen. 107 (1987), 87-2 CPD ¶ 534. We fail to see, however, how a bid with no indication whatsoever of the required minimum operating hours or in fact any operating hours, clearly indicates the bidder's intent to be bound by the amendment.

Finally, Universal claims that acceptance of its bid is in the best interests of the government because WHS would benefit by receiving superior service at the best price. It is well-established, however, that the importance of maintaining the integrity of the competitive bidding process outweighs any pecuniary advantage that WHS might gain by accepting a nonresponsive bid. Vertiflite Air Servs., Inc., B-221668, Mar. 19, 1986, 86-1 CPD ¶ 272. Moreover, since Universal failed to acknowledge a material amendment and its bid does not establish its intent to be bound by the terms of the amendment, Universal would not be legally bound to perform in accordance with the terms of the amendment, and the government would bear the risk that performance would not meet its needs. See C Constr. Co., Inc., 67 Comp. Gen. 107, supra.

The protest is denied.


James F. Hinchman
General Counsel